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July 16, 2004
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: April 28, 2004

Case No.: TIA-0091

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. An independent physician panel determined that one of the Applicant's illnesses was related to his work at DOE, but that three other illnesses were not. The OWA accepted the panel's determination, and the applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA).

I. Background

A. The Applicable Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. The Act provides for two programs, one of which is administered by the DOE. 1/

The DOE program is intended to aid DOE contractor employees in obtaining workers' compensation benefits under state law. Under the DOE program, an independent physician panel assesses whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3). In general, if a physician panel issues a determination favorable to the employee, the DOE

1/ The Department of Labor administers the other program. See 10 C.F.R. Part 30; www.dol.gov/esa.

instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3). As the foregoing indicates, the DOE program itself does not provide any monetary or medical benefits.

To implement the program, the DOE has issued regulations, which are referred to as the Physician Panel Rule. 10 C.F.R. Part 852. The OWA is responsible for this program and has a web site that provides extensive information concerning the program. 2/
The Act provides for two programs.

B. The Application

The Applicant was employed by a DOE contractor as a chemical operator at the DOE's Oak Ridge Y-12 plant. The Applicant was born in 1927. He worked at the site from 1953 until his retirement in 1990, at the age of 62.

The Applicant filed an application for physician panel review, claiming that he had two illnesses related to toxic exposures at DOE - chronic obstructive pulmonary disease (COPD) and basal cell carcinoma. During the case development process, the Applicant claimed that he had two additional illnesses related to toxic exposures at DOE - heart disease and hypertension.

In 2003, a physician panel considered the illnesses claimed in the original application: COPD and basal cell carcinoma. The panel determined that they were not related to the Applicant's DOE employment.

The OWA accepted the 2003 panel determinations, and the Applicant appealed, arguing panel error. In addition, the Applicant stated that his medical records overstated his smoking. Finally, he stated that he had just been diagnosed with a fifth illness - prostate cancer.

After considering the appeal, we remanded the application for further consideration. *Worker Appeal*, Case No. TIA-0030 (December 1, 2003), 28 DOE ¶ 80,310 (2003). We found that the panel report on COPD and basal cell carcinoma was unclear

2/ See www.eh.doe.gov/advocacy.

concerning whether the panel had considered all of the claimed exposures. In addition, we found that the panel should have considered the two illnesses added to the application during the case development process, i.e., hypertension and heart disease. We stated that, prior to a second referral of the application to a physician panel, the Applicant could submit an affidavit concerning his smoking history.

On remand, the physician panel reviewed the application again. The panel considered the four illnesses claimed in the application process. The physician panel issued a positive determination on COPD, and negative determinations on basal cell carcinoma, heart disease and hypertension. For the three negative determinations, the panel's explanation clearly stated that it found no association between the illnesses and toxic exposures at DOE.

In his current Appeal, the Applicant challenged the negative determinations. He discussed his health and exposures, and he stated that no one in his family has had hypertension or skin or prostate cancer. The Applicant supplied medical records in support of his appeal, including a diagnosis of prostate cancer. Finally, during our consideration of the Appeal, the Applicant advised us that he has additional medical problems.

II. Analysis

The Physician Panel Rule specifies what a physician panel must include in its determination. The panel must address each claimed illness, make a finding whether that illness arose out of and in the course of the worker's DOE employment, and state the basis for that finding. 10 C.F.R. § 852.12(a)(5). As the history of this case shows, we have not hesitated to remand an application where the panel report did not address the matters required by the Rule.

The Applicant's arguments on appeal - that he had occupational exposures and no family history of some illnesses - are not bases for finding panel error. As mentioned above, the Physician Panel addressed each claimed illness, made a determination, and explained the basis of that determination. The Applicant's arguments are merely disagreements with the panel's medical judgment, rather than indications of panel error.

As for the lack of panel review on prostate cancer, we similarly find no error. The illness was not claimed in the application or the case development process and, therefore, the record did not

contain any information on the illness. It appears to us that the first documentation of the illness was filed in conjunction with the instant appeal. If the Applicant seeks panel review of prostate cancer or any other illness, he should file a written request with OWA. In the meantime, we will forward, to OWA, the documents that the Applicant submitted in conjunction with his Appeal.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0091 be, and hereby is, denied.
- (2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: July 16, 2004

